Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

STATE OF INDIANA, PETITIONER,

v.

ROY LEE WARD, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a state appellate court reverse a conviction on a Sixth Amendment jury bias claim consistent with *Beck v. Washington*, 369 U.S. 541 (1962), where a criminal defendant did not object to the jury until after he was convicted?

2. Did the Indiana Supreme Court significantly depart from this Court's well-established precedent when finding that Ward was not scrupulously afforded an impartial jury?

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OPINIONS BELOW

The opinion of the Indiana Supreme Court (App. 1a) is reported at *Ward v. State*, 810 N.E.2d 1042 (Ind. 2004), *reh'g denied*. The order of the Spencer Circuit Court denying Ward's Motion for Change of Venue (App. 15a) is unreported.

JURISDICTION

On June 30, 2004, the Indiana Supreme Court reversed Ward's conviction and death sentence for murder, rape, and criminal deviate conduct. App. 1a. The State filed a petition for rehearing, which the Indiana Supreme Court denied without opinion on September 21, 2004. App. 14a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury* * *." U.S. CONST. Amend. VI.

The Fourteenth Amendment to the Constitution provides in relevant part: "* * * nor shall any State deprive any person of life liberty, or property, without due process of law* * *." U.S. CONST. Amend. XIV.

STATEMENT

An Indiana jury of the Spencer Circuit Court found Ward guilty of the murder, criminal deviate conduct, and rape of a 14-year-old girl. It unanimously recommended that Ward be sentenced to death for the murder. The trial court sentenced Ward to death for murder, and two terms of 50 years imprisonment for rape and criminal deviate conduct. On direct appeal, the Indiana Supreme Court reversed Ward's convictions after finding that pre-trial publicity biased the jury pool against Ward.

1. The underlying facts

On the afternoon of July 11, 2003, Ward approached the Payne family residence in Spencer County, Indiana and convinced 14 year-old Stacy to allow him into the house by feigning a search of the area for a lost dog. Thereafter, Stacy's sister Melissa awoke from a nap to the sound of Stacy screaming. Melissa went to the top of the stairs and saw Ward on top of Stacy. Melissa could not see Ward's face, but could discern that he wore dark clothes, had dark hair, was approximately five feet and six to eight inches tall, and appeared to be approximately 30 to 35 years old. Ward was holding Stacy down. Melissa went to her parents' room and called 9-1-1. While Melissa was talking on the telephone she could hear Ward telling Stacy that she had better be quiet. Melissa could hear her sister telling Ward to "please stop." Melissa heard someone arrive at the house and tell Ward to get down on the ground.

Dale Town Marshall Matt Keller arrived at the Payne home in response to a dispatch at approximately 12:32 p.m. When Officer Keller arrived, he saw a black car with a Perry County license plate in the driveway. When he opened the front door to the house, he saw Ward standing in the doorway, covered in sweat and holding a knife in his right hand. Officer Keller drew his weapon and ordered Ward to the ground. Ward did not speak or move and Officer Keller again ordered him to the ground. Ward then said, "I didn't do anything." Shortly afterwards, Ward dropped the knife, laid on the ground, and placed his hands on top of his head. The knife was black, and was six to eight inches long.

Stacy was lying on the floor, nude from the waist down, covered in blood, and trying to speak. Her intestines were visible on the floor. She was transported to the hospital where doctors found much or all of her small intestine was outside of her abdominal cavity on the skin outside of a laceration across her abdomen. Only four or five inches of Stacy's abdomen was not lacerated. The cut penetrated through Stacy's flesh into the internal contents of her abdominal cavity. Stacy's vena cava had been totally cut, and her spine had been cut. This incised wound was comprised of two cuts measuring 24.5 inches. Stacy was also lacerated across her neck, at approximately the level of her Adam's apple. That laceration opened the front half of her windpipe. Stacy's left hand was also lacerated to the bone. She was conscious, but at a decreased level. She was not able to speak because of the wound across her throat. Stacy died later that afternoon from these injuries.

A forensic investigation revealed that Stacy had suffered 21 blunt force injuries, including injuries that were found within the vaginal vault. There were two areas within the vaginal region, including the hymen that showed blunt force injury. Doctors believe that that Stacy's vaginal injuries were caused by the insertion of a penis, a digit, or an object into her vagina.

The Indiana State Police Crime Lab found body fluid other than blood that was found in Stacy's body. Scientists determined through DNA testing that the odds that the fluid was contributed by another unrelated individual was 12 billion to 1.

2. The state court proceedings

The State of Indiana charged Ward in the Spencer Circuit Court with murder, rape, and criminal deviate conduct and requested the death penalty.

Ward moved for a change of venue or, in the alternative, to draw the jury from another county. At a hearing on the motion, Ward withdrew his motion. Later, Ward filed another motion for a change of venue. The trial court conducted a hearing and then denied the motion by written order stating that it believed an impartial jury could be selected. App. 15a. The trial court also ruled that should that not be the case, it would be willing to revisit that conclusion. App. 15a.

Prior to jury selection, prospective jurors completed questionnaires which included a brief recitation of the facts surrounding this case. At jury selection, Ward did not challenge for cause any of the 12 jurors or two alternate jurors selected. However, two days later, Ward did indicate that he would have made more peremptory strikes had they been available.

At the guilt phase of trial, the jury found Ward guilty of murder, rape, and criminal deviate conduct. At the penalty phase of trial, the jury also found as aggravating circumstances that: 1) Ward mutilated and tortured Stacy while still alive; 2) Ward intentionally killed Stacy while committing or attempting to commit rape; 3) Ward intentionally killed Stacy while committing or attempting to commit criminal deviate conduct; and 4) Ward was on probation for a felony conviction when the murder was committed. The jury further found that the aggravating circumstances outweighed mitigating circumstances and recommended that Ward be sentenced to death for the murder.

The trial court sentenced Ward accordingly and also imposed two consecutive 50-year terms of imprisonment for the rape and criminal deviate conduct convictions.

3. The Indiana Supreme Court decision

On direct appeal, Ward claimed that he had been entitled to a change of venue due to pre-trial publicity. The Indiana Supreme Court reversed Ward's convictions after finding that pre-trial publicity cast sufficient doubt as to the ability of prospective jurors to be impartial if selected such that the federal Constitution required the trial court to grant a change of venue, citing *Irvin v. Dowd*, 366 U.S. 717 (1961). App. 12a.

REASONS TO GRANT THE PETITION

The Indiana Supreme Court incorrectly relied upon *Irvin v. Dowd*, 366 U.S. 717 (1961), to reverse Ward's convictions. While the State recognizes the critical importance of the right to a trial before an impartial jury, the state supreme court failed to consider controlling precedent of this Court in concluding that Ward was not scrupulously afforded this right.

This Court should grant this petition for two reasons: 1) Ward failed to object to the jury's impartiality at any time prior to his convictions as required by *Beck v. Washington*, 369 U.S. 541, 557-58 (1962); 2) the Indiana Supreme Court significantly departed from this Court's well-established precedent by finding that Ward was not scrupulously afforded an impartial jury.

I.

Criminal defendants must, at a minimum, object to the impartiality of seated jurors before a change of venue is constitutionally required.

Ward was first heard to object to the impartiality of his jury on appeal following his conviction and sentence. *Beck* requires a defendant to object during jury selection to alleged bias. *Beck*, 369 U.S. at 557-58. The Indiana

Supreme Court departed from well established constitutional jurisprudence in reversing Ward's convictions. This Court should grant the writ to review the Indiana Supreme Court's erroneous finding of constitutional error absent Ward's challenges for cause prior to his conviction and sentence.

Before a criminal defendant can be heard on appeal to assert a constitutional challenge to the venue of his trial, he must have objected to the impartiality of the jurors actually selected to judge him.

> The fact that petitioner did not challenge for cause any of the jurors so selected is strong evidence that he was convinced the jurors were not biased and had not formed any opinions as to his guilt. * * * While the Court stands ready to correct violations of constitutional rights, it also holds that it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.

Id.

The Indiana Supreme Court relied upon *Irvin v. Dowd*, 366 U.S. 717 (1961), in finding that Ward was constitutionally entitled to a change in venue. *Irvin* involved a trial where a defendant had requested a second change of venue after having already received one. However, the trial court believed that state law allowed only one change of venue and therefore denied the motion despite rampant pre-trial publicity in the community. *Id.* at 720. During jury selection, Irvin objected to the seating of jurors who had expressed an opinion on his guilt. *Id.* at 724. This Court reversed the denial of federal habeas corpus relief, stating, "With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds

of the members admit, before hearing any testimony, to possessing a belief in his guilt." *Id.* at 728.

While *Irvin* provides the basis for Ward's claim, *Irvin* cannot be read in isolation. *Beck* was decided just one year after *Irvin* and clarified *Irvin*'s bounds. *Beck* observed that a defendant's constitutional right is not to a change of venue, but rather to an impartial jury. "Of course there could be no constitutional infirmity in [denying a change of venue] if [the defendant] actually received a trial by an impartial jury." *Beck*, 369 U.S. at 556.

The trial court understood and applied this concept. App. 15a. The Indiana Supreme Court, however, found that Ward was denied his constitutional right to a change of venue. The Indiana Supreme Court's reliance on *Irvin* and other cases of this Court reveals that it saw the federal Constitution, and not the state change of venue statute, as the basis for its decision. App. 9a-10a, 12a. The Indiana Supreme Court's first error was to depart from *Beck* and find that Ward was constitutionally entitled to a change in venue.

Moreover, *Beck* held that a defendant cannot be heard on appeal to state a constitutional claim of an impartial jury if he did not first object to the jurors' bias at the time of selection. *Id.* at 557-58. Ward's conduct during jury selection belies his bias claim. Each seated juror promised, under oath, that they could set aside what they had heard previously and remain unbiased toward Ward's guilt. Ward, while not comfortable with the jury as a prudential matter, was satisfied as to the jury's impartiality as a mater of law.

Ward has never shown, because he cannot show, that his jury was actually biased against him. Given that fact, the Indiana Supreme Court erred in reversing Ward's convictions due to pre-trial publicity under *Irvin*. This Court should grant certiorari to review the Indiana Supreme Court's departure from established federal law.

II.

The Indiana Supreme Court significantly departed from this Court's well-established precedent in finding that Ward was not scrupulously afforded an impartial jury.

A. The Indiana Supreme Court misapplied the analysis set forth by this Court to determine whether the presumption of truthful juror representations during voir dire have been overcome by a showing of a general atmosphere of community prejudice.

The Indiana Supreme Court misapplied this Court's holding in *Irvin v. Dowd*, 366 U.S. 717 (1961) in concluding that Ward was tried by a biased jury in violation of the Sixth and Fourteenth Amendments. First, the Indiana Supreme Court misapplied *Irvin* in finding that a showing of a general atmosphere of community prejudice overcame the presumption that jurors truthfully represented in *voir dire* that they could decide the issues based upon the evidence and instructions. App. 12a. As this Court has stated, "the measure of a jury is taken by reference to the impartiality of each individual juror." *Morgan v. Illinois*, 504 U.S. 719, 735 (1992). "...[I]t is the adversary seeking exclusion who must demonstrate, *through questioning*, that the potential juror lacks impartiality. It is then the trial judge's duty to determine whether the challenge is proper." *Id.* at 733 (emphasis in original). Here, the Indiana Supreme Court clearly declined to credit representations of jurors during *voir dire* that they could decide the case based on the evidence and the trial court's instructions because of answers given by prospective jurors in responding to the juror questionnaire circulated by Ward.

In basing its decision based upon the responses reflected in the juror questionnaires, the Indiana Supreme Court failed to set out and apply the proper standards enunciated by this Court for evaluating

whether jurors who state under oath that they can remain impartial may nonetheless be biased by pre-trial publicity and community sentiment. This Court has clearly stated that reviewing courts are to look at the "totality of the circumstances" to determine whether a criminal defendant's trial was fundamentally unfair. *Murphy v. Florida*, 421 U.S. 794, 799 (1975).

Murphy set out specific factors to be considered in examining the totality of the circumstances to determine whether the general atmosphere of the community or the courtroom is unconstitutionally inflammatory. First, *Murphy* requires the consideration of the circumstances surrounding a defendant's trial to determine whether the community was exposed to such publicity as to make a fair trial impossible. *Id.* at 802. This Court has held that a key factor is whether the publicity occurred either immediately before or during the trial such that the trial atmosphere is utterly corrupted by press coverage. *Id.* at 798. Accordingly, this Court refused to reverse Murphy's conviction on change of venue grounds based upon his allegations of pre-trial publicity occurring seven months before the jury was selected in his case. *Id.* at 802-803; *See also Patton v. Yount*, 467 U.S. 1025, 1033-34 (1984)

Further, this Court has stated that in those cases where venue was found to be improper, the proceedings were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to fairness and rejects the verdict of a mob. *Murphy*, 421 U.S. at 798-799 discussing *Irvin v. Dowd*, 366 U.S. 717 (1961) (community was subjected to barrage of inflammatory publicity the day before trial including defendant's confession to 24 burglaries and six murders including the one for which he was tried, and the defendant's unaccepted offer to plead guilty in order to avoid the death sentence); discussing *Rideau v. Louisiana*, 373 U.S. 723 (1963) (community exposed to 20-minute film of defendant's confession broadcast three times by local television station before his trial); discussing *Estes*

v. Texas, 381 U.S. 532 (1965) (trial was conducted in a "circus atmosphere" in which press was allowed to sit within the bar of the court and overrun it with television equipment); discussing *Sheppard v. Maxwell*, 384 U.S. 333 (1966) ("trial infected not only by a background of extremely inflammatory publicity but also by a courthouse given over to accommodate the public appetite for carnival").

Another key factor is whether the prejudicial publicity is largely factual or contains scandalous information or evidence that is so prejudicial to the defendant that it would not be admissible at trial and would deprive him of a fair trial. *Murphy*, 421 U.S. at 800 n. 4. However, this Court has pointed out that its cases on this subject cannot be made to stand for the proposition that juror exposure to information about a defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process. The key inquiry is whether under the "totality of the circumstances" the defendant's trial was not fundamentally fair. *Id.* at 799-800.

As discussed above, another significant factor to be considered is whether a defendant challenges any of the allegedly biased jurors for cause. If he did not, venue need not be changed because that is strong evidence the defendant believed the jurors were not biased. *Beck* at 557-558. The Indiana Supreme Court does not mention or consider this important factor in its opinion and disregards entirely the fact that Ward did not challenge any of the seated jurors.

In Ward's case, the Indiana Supreme Court failed to set out and apply these standards, and in doing so, disregarded the totality of the circumstances. The Indiana Supreme Court used an incomplete and incorrect standard to impute juror bias. Specifically, it found a pattern of deep and bitter hostility and a general atmosphere of prejudice throughout the community by relying upon responses of potential jurors in juror

questionnaires and the fact that six of the fourteen jurors finally seated expressed an initial belief that Ward was guilty. App. 11a. The Indiana Supreme Court then applied an incomplete version of the *Murphy* standard, claiming that a general atmosphere of prejudice was evidenced by the fact that "most" of the potential jurors had admitted to a "disqualifying prejudice" and cited *Irvin* in holding that "'the Constitution requires that the defendant "be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which [one half][1] of the members admit, before hearing any testimony, to possessing a belief in his guilt.' *Irvin*, 366 U.S. at 728". App. 12a.

The Indiana Supreme Court failed to consider the totality of the circumstances and other factors required by *Murphy* and *Beck*. It additionally applied an erroneous interpretation of this Court's holdings in *Murphy* and *Irvin*, each of which required that *most* of the members of the venire have a *disqualifying prejudice* before finding a biased community sentiment. In simple terms, more than half of the potential jurors must have a *disqualifying prejudice* against the defendant. As discussed below, not all prejudices or preconceptions are disqualifying. *See Reynolds v. State*, 98 U.S. 145, 155-56 (1879). In Ward's case, only 43 of 128 potential jurors were excused for cause and of those only approximately 30 were for purposes of bias or prejudice, well short of the majority of potential jurors required under *Irvin* and *Murphy*. In *Irvin*, rightly reversed on venue grounds, most of the potential jurors did have a disqualifying prejudice evidenced by the fact that 268 of 430 potential jurors were excused for cause. *Irvin*, 366 U.S. 717 at 727. Ward's case is more analogous to *Murphy* where only 20 of 78 potential jurors were excused for cause and this Court concluded the jury was fair and venue proper because most of them did *not* have a disqualifying prejudice.

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[1] The Indiana Supreme Court opinion substitutes "one-half" for the higher "two-thirds" standard applied by this Court in *Irvin*.

Murphy, 421 U.S. at 796. This Court has on at least one occasion found that even if a majority of the potential jurors were excused for cause (not the case in *Ward*), that in and of itself was not enough to require a change of venue. *Patton*, 467 U.S. at 1044-1045 (121 of 163 potential jurors were excused for cause).

Likewise, the Indiana Supreme Court's reliance on the fact that "one-half" of the jurors actually selected in Ward entered *voir dire* with a preconception that he was guilty is not determinative and applies the wrong standard. Two-thirds of the jurors in *Irvin* entered the trial with a belief that Irvin was guilty. Even assuming that "one-half" was the proper standard to be applied, the number of jurors with preconceptions alone is not dispositive. As discussed below, it is the responsibility of the trial judge to determine whether those preconceptions are so fixed or so deep that they rise to the level of the "presumption of partiality." *Reynolds*, 98 U.S. at 156; *Patton*, 467 U.S. at 1038-1040. Even on direct appeal, the trial court's determination of this question is entitled to "special deference." *Patton*, 467 U.S. at 1038.

If the proper standards of this Court had been applied in Ward's case, the result would have been different. First, the record does not reflect a trial atmosphere so corrupted by media coverage immediately before or during trial that change of venue was necessary. *Irvin* does not compel the result reached by this Court because the facts of this case pale in character and scope to those in *Irvin*. *Irvin* involved a series of six murders over two years generating significant publicity in 1961. *Irvin*, 366 U.S. at 719-20. News accounts referred to a police line-up, a lie detector test, statements from police that the six murders were solved but the defendant refused to confess, statements that the defendant offered to plead guilty, and statements that the defendant had confessed to 24 burglaries which were compared to the murder as part of a *modus operandi*. *Id.* at 725. One news account detailed the promise of a local sheriff to devote his life to the

execution of the defendant in Kentucky if Indiana failed to execute him. Another article described the defendant as remorseless and without conscience. Other stories described the defendant as the "confessed slayer of six." Still others described criticism of the defense counsel for representing Irvin. And on the *day before the trial*, newspapers reported that Irvin had orally admitted the murder of the victim as well as the murder of five other individuals. *Id.* at 725-726.

The Indiana Supreme Court concedes and the record reflects that media coverage in this case consisted of largely accurate factual accounts. Moreover, by the date of the trial it was remote in time. The hearing on Ward's change of venue motion was held approximately five months before the actual trial began. No news account presented at the hearing appeared later than April 2002—six months prior to the trial. The three most recent articles submitted were from March and April 2002 and gave general factual accounts of court hearings that had taken place and made very cursory references to the facts of the case. The Indiana Supreme Court noted a series of newspaper articles all of which appeared between July 13, 2001 (two days after the murder and fifteen months prior to trial) and November 15, 2001 (eleven months prior to the trial). App. 4a.

In *Murphy*, this Court refused to reverse a defendant's conviction on the grounds of pretrial publicity noting that all of the pretrial publicity had occurred during a two month period seven months before the jury in the case was selected, and that the news articles were "largely factual in nature." *Murphy*, 421 U.S. at 802. The Indiana Supreme Court agreed that all of the news accounts in this case were "largely accurate accounts" and their prejudicial nature was "only marginally at issue" in Ward's case. App. 4a. Therefore, it is not surprising that Ward did not challenge *any* of the fourteen jurors seated in this case for having been exposed to this publicity. Ward's trial took place in October 2002—one year and

three months after the murder, one year and one month after the last news account cited in footnote 2 of the Indiana Supreme Court's opinion, and six months after the last article *submitted by Ward in support of* his change of venue motion.

Any potential juror in any venue exposed to even the most innocuous publicity likely will develop some preconceived notion of a defendant's guilt where the defendant is arrested at the scene of the crime. To require a jury devoid of any preconceived ideas in such a case is to set an impossible standard. See *Irvin*, 366 U.S. at 722-723. "Qualified jurors need not be totally ignorant of the facts and issues involved. *Murphy*, 421 U.S. at 799-800. Before its decision in this case, Indiana's Supreme Court had adhered to the same standard propounded by this Court:

> ...[A]ssuming *arguendo* that all potential jurors in Putnam County had preconceived notions as to defendant's guilt or innocence, the defendant's burden was not thereby satisfied. He was also required to show that the jurors were unable to set aside those notions and render a verdict based upon the evidence adduced at trial.

Pine v. Indiana, 408 N.E.2d 1271, 1272 (Ind. 1980). In Ward's case, despite the *alleged* inflammatory publicity and hostile community sentiment, only six of the twelve jurors indicated that they had formed some belief concerning his guilt or innocence. None of these six were challenged by Ward for cause and each indicated they could set aside these opinions and decide the case on the evidence presented at trial. In *Pine*, the Indiana Supreme

Court refused to overturn the defendant's verdict even though *all twelve jurors* had apparently heard and/or read reports of the case. *Id.* at 1272-1273. See also *Dollinger v. Indiana*, 408 N.E.2d 1228, 1235 (Ind. 1980) (appellant had simply shown that community was "well aware of the charges against him" when 44 of 46 prospective jurors had heard of case); and *Sloan v. Indiana*, 496 N.E.2d 401, 405 (Ind. 1986) (pretrial publicity and expressions of public hostility insufficient to overturn denial of motion for change of venue). In fact, the Petitioner has found no other holdings by the Indiana Supreme Court rendered after *Irvin* in which it refused to affirm a trial court's decision to credit juror statements on *voir dire* based on pretrial publicity or community sentiment.

A comparison of this case to this Court's holdings in *Irvin*, and *Patton*, is instructive. *Patton* involved a relatively small county with even more attending publicity than this case. *Patton*, 467 U.S. at 1032. In *Patton*, 161 of 163 potential jurors had heard of the case before; 126 potential jurors had formed an opinion regarding guilt; and 121 had been excused for cause. Further, three of the 12 jurors ultimately seated in *Patton* had been challenged for cause; and eight of 14 had an opinion as to defendant's guilt before hearing testimony. *Id.* at 1029-30, 1039. Contrary to the Indiana Supreme Court's opinion, the transcript in Ward's case shows only 43 jurors excused for cause, and of those approximately 30 were excused for partiality reasons.[2] Even adding the twelve jurors that Ward claimed on appeal were improperly not excused for cause, the numbers still pale in comparison to those in *Patton* or *Irvin*, indicating that Ward's jury pool did not have the same taint or bias as either of those pools. As discussed above, *Patton* and *Murphy* also limited the holding in *Irvin* to those cases where a large amount of extremely prejudicial press coverage occurs immediately before trial or during trial.

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[2] The Indiana Supreme Court inadvertently states that 48 jurors were excused for cause. App. 6a.

Patton, 467 U.S. at 1035. Neither occurred in this case, as the evidence in the record shows less than one news article per month with none in the six months immediately before trial.

Further, this case is not factually analogous to *Irvin*. There is no showing of anything approaching a "circus" atmosphere at trial or near the time of the trial. The Indiana Supreme Court erroneously relied upon an occurrence in the Courthouse Rotunda more than a month prior to trial as evidence of a hostile community environment. This incident, the character and circumstances of which is not made clear by the record, occurred 38 days before the trial and was not in the presence of the public, media, potential jurors, or jurors. The judge admonished the parties in the courtroom and the victim's family.[3] The record evidences no outbursts during trial, or even an excessive media presence.

The record reflects and the Indiana Supreme Court concedes that the media coverage of Ward's case involved largely accurate factual accounts of the crime and those facts were never disputed by Ward and were not at issue during the trial. The Indiana Supreme Court noted that some of the juror questionnaires contained extreme language about what type of punishment Ward should receive. The Court erroneously extrapolated expressions of an exceedingly slim fraction of the total potential jury pool and treated them as representative of the opinions of the entire community and the entire jury pool. A careful review of the questionnaires shows that is simply not the case. The Court cites fifteen quotes offered in Ward's Appendix to his Brief of the Appellant on direct appeal from the 122 questionnaires

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[3] The Indiana Supreme Court inaccurately states that the trial judge had to admonish the "crowd." App. 5a.

completed as a representative sample of the jury pool. The Court erred in concluding that the responses of approximately 12% of those jurors who completed the questionnaire were representative of the entire pool and constituted bias. Moreover, all of those jurors were excused. App. 6a. These very inflammatory responses were rare and actually enabled the defense and the State of Indiana to exclude those jurors in *voir dire*. Ward's trial strategy was to admit in opening statement that he was responsible for the death of Stacy Payne and to argue that there was insufficient evidence upon which to convict him for rape and criminal deviate conduct hoping to thereby eliminate aggravating factors that would support a death sentence. Any knowledge that jurors had about Ward's case came either from factual news accounts or the factual summary presented by Ward in his juror questionnaire. None of the jurors possessed knowledge of any facts that were not admitted as evidence during trial or were contested by Ward during the trial. This Court should grant Petitioners' writ to review the constitutional issue of whether the Indiana Supreme Court applied the proper standards set forth in this Court's prior decisions to impute jury partiality.

B. The Indiana Supreme Court significantly departed from the accepted and usual course of judicial proceedings in finding the trial court improperly seated a juror.

Finally, the Indiana Supreme Court incorrectly applied this Court's well-established jurisprudence regarding the determination of whether a juror is impartial when it concluded that Juror #121 was actually biased, in disagreement with the trial court. "The constitutional standard that a juror is impartial only if he can lay aside his opinion and render a verdict based on the evidence presented in court is a question of federal law." *Patton*, 467 U.S. at 1037 n. 12 citing *Irvin*, 366 U.S., at 723. Juror-disqualification questions may raise both a question of law -- whether the correct standard was applied -- and a question of fact. *Id.* at 1037. Whether an opinion expressed by a juror meets the legal standard for disqualification should be viewed as a question of fact as to which deference is due to the trial court's determination. *Id.* Factual findings are to be considered separately from the legal standard applied and deference is due those findings. *Id.* A trial court's resolution of such questions is entitled, even on direct appeal, to "special deference." *Id.* at 1038.

This Court has long held that a trial court's findings regarding juror impartiality may be overturned by a reviewing court only for manifest error. *See Reynolds v. State*, 98 U.S. 145 (1879); *Patton v. Yount*; *Mu'min v. Virginia*. Notably, in *Reynolds* and again in *Patton*, this Court stated:

> [The] manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be

> spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such *a question of fact*, except in a clear case." *Id.*, at 156-157 (emphasis added). Taken together, these passages plainly show that the "character of [a juror's] opinion" was considered a question of fact. Contrary to the suggestion of the dissent, *post*, at 1050, n. 6, the factual question was not limited to whether the juror was telling the truth, but included discovering the "real character" of any opinion held. Deference was due to the trial court's conclusions on that question.

Patton, 467 U.S. at 1037 n. 12 (quoting *Reynolds*, 98 U.S. at 155). The standard that the reviewing court must follow, then, is that the burden is on the challenger, in this case the defendant, to show the "actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality." *Id.* at 157. Unless such a showing is made, it is not necessary to set the juror aside and it is not error for the court to refuse to do so. *Id.*

In Ward's case, the Indiana Supreme Court found that one particular juror (Juror Stiles also known as Juror #121) was biased based upon an isolated statement. The trial court had no need to focus exclusively on one individual statement, but instead relied upon all of her statements in Ward's lengthy juror questionnaire, as well as her extensive *voir dire* testimony. Not every opinion

held by an individual juror automatically rises to the level of a disqualifying prejudice. Intelligent, thoughtful jurors, such as Juror #121, would be expected to have read or heard about the case and have some initial impression as to its merits. *See Reynolds*, 98 U.S. at 155-156. This Court has also noted in the past that:

> . . . . we ought not to be unmindful of the fact we have so often observed in our experience, that jurors not unfrequently seek to excuse themselves on the ground of having formed an opinion, when, on examination, it turns out that no real disqualification exists.

Id. at 156. Obviously, the trial court is in the best position of all to evaluate the overall character of a potential juror's answers to *voir dire* questions and whether they indicate bias.

Again, Ward did not challenge any of his fourteen jurors and made no attempt to show the actual existence of any bias on the part of any of them. The Indiana Supreme Court erroneously intruded upon trial court discretion by concluding that jurors, credited by the trial court on voir dire, could not be believed. The trial court concluded that it was possible to empanel an impartial jury from Spencer County as evidenced by its May 31, 2002 order, and after *voir dire*, concluded that it had in fact done so. App. 15a.

The *Patton* Court noted that since 1879, whether an opinion expressed by a juror was such as to meet the legal standard for disqualification has been viewed as a question of fact as to which deference was due to the trial court's determination. *Patton*, 467 U.S. at 1037. The State of Indiana recognizes that *Patton* was a case in

which federal habeas standards were applied. *Id.* at 1032. However, habeas standards aside, *Patton* sets forth the measures required by the Sixth and Fourteenth Amendments to ensure a trial by an impartial jury. The Indiana Supreme Court's jurisprudence prior to its *Ward* opinion had consistently followed *Patton* in this regard. See *Harris v. Indiana*, 659 N.E.2d 522, 525 (Ind. 1995) ("The trial court was in the best position to assess the honesty and integrity of [a juror] and her ability to perform as a conscientious, impartial juror"). The Indiana Supreme Court significantly departed from its own jurisprudence and this Court's jurisprudence in disturbing the trial court's exercise of discretion through its misplaced focus upon the unrepresentative inflammatory comments reflected in the juror questionnaires.

The Indiana Supreme Court further opined that the empanelment of one juror in particular, Juror Stiles, alone violated Ward's right to a fair trial and the trial court abused its discretion in seating that juror. App. 12a. The Indiana Supreme Court's conclusion was wrong not only because the trial court was in a far better posture to assess Stiles' credibility on this point, but because Ward declined to even attempt to challenge Juror Stiles for cause. In fact, Ward did not challenge Juror Stiles for cause, did not exercise one of his remaining peremptory challenges, and raised no objections to this particular juror on direct appeal to the Indiana Supreme Court. The Indiana Supreme Court, *sua sponte*, found that this particular juror was biased without acknowledging or considering Ward's decision not to challenge or peremptorily strike her. This is all the more telling considering that at the time the parties agreed on Juror Stiles, Ward still had a peremptory strike available.[4] To the extent that the Indiana Supreme Court supports its

[4] In fact, only one juror (Juror #156) was seated after Ward exhausted his peremptory challenges, and Ward did not challenge him (or any other juror ultimately seated, for that matter).

result by concluding that the trial court abused its discretion by failing to, *sua sponte*, remove Juror Stiles for cause, such was never argued by Ward, ostensibly because Juror Stiles was an acceptable juror in the eyes of the defense.

The trial court properly concluded that Juror Stiles (Juror #121), was impartial and could decide the issues based on the law. This conclusion is supported by Ward's unqualified acceptance of Juror Stiles. Moreover, Ward had ample reason to find Stiles a desirable juror. Juror Stiles' preconceptions regarding Ward's guilt was based on her knowledge that he was arrested at the Payne house. Ward's responsibility for the murder was not a contested issue at trial as his counsel conceded in opening statement and closing argument of the trial's guilt phase that Ward was responsible for Stacy Payne's death. Juror Stiles at no time stated she thought Ward was guilty of sexual assault or should receive the death penalty. Ward's counsel told the jury in the penalty phase of the trial that since the beginning of the case they had said Ward is to blame for the brutal senseless murder of Stacy Payne. Ward's counsel argued that they believed that the physical evidence with respect to Counts II and III charging sexual assault were weak enough that there was a possibility that there would be a finding of not guilty on those two counts. In other words, the defense strategy was to obtain an acquittal on the sexual assault charges to eliminate statutory aggravating circumstances that supported a sentence of death.

Juror Stiles' questionnaire revealed that she was an x-ray technician with a chemistry and biology background. She believed DNA helped to solve murder and rape cases. DNA was a large issue regarding the sexual assault charges and to the defense theory that the DNA of Stacy Payne found on Ward's penis may have been transferred there by contact other than sexual contact. Juror Stiles' questionnaire also showed she had a difficult family life, had a nephew currently incarcerated, had an opinion that

dysfunctional family life has an effect on children, and they could have received some help along the way. She generally believed mental health professionals were accurate in their diagnoses, and offered helpful testimony. Her questionnaire showed she generally does not believe in taking one life for another, that she would only reluctantly consider voting for the death penalty, and that she would strongly consider voting for life without parole.

Although she stated in her questionnaire and during *voir dire* that she had an opinion that made it difficult for her to be fair to defendant, she testified that she could follow the judge's direction on what to do and abide by the law. She indicated she would follow the murder instruction requiring the state to prove each element beyond a reasonable doubt. She indicated she did not believe everything that she read in the newspaper, heard on the street, or heard in general. She understood that evidence comes from the witness stand. In response to extensive questioning from the defense, she verified that her nephew was incarcerated, and that she hoped he would get some help and become rehabilitated. She agreed that the State of Indiana had to produce evidence of the elements of rape at trial. She admitted that she watched the television show "CSI" and, based on her chemistry/biology background, described what kind of DNA evidence might exist in rape cases, where it might be found, and agreed that she expected to see that type of evidence in a rape case. In this case, DNA from Stacy Payne was found on Ward's penis, but no DNA from Ward was found in Stacy Payne's vagina, which was an important part of Ward's transfer theory defense that DNA can be obtained from almost any part of the body. Juror Stiles was a desirable juror for Ward.

Juror Stiles further stated in *voir dire* that she would trust her own memory on a disputed fact and not just go along with the majority. In response to questions from the State about whether she could vote for the death penalty in an appropriate case she responded "probably". When the trial judge went back to her a final time she stated she "didn't know and it would be "difficult" to change her mind on her opinion about Ward, but she did not say her opinion was "fixed" or that she could "not" change her mind.

The trial court properly seated Juror Stiles based on: (1) her earlier answers that she could follow the judge's direction on what to do and abide by the law; (2) that she expected to see certain types of evidence in a rape case; (3) her agreement that the State of Indiana had to present evidence on the elements of rape; (4) her statement that she could only "probably" vote for the death penalty in an appropriate case; (5) along with her demeanor, inflection, and the flow of the questions and her answers; and (6) the total record of her responses in the questionnaire and at voir dire. Of major significance is that defense counsel, who was certainly not reluctant about challenging jurors for cause, did not object to Juror Stiles.

The character of *voir dire* responses offered by Juror Stiles are comparable to those offered by Juror Hrin in the *Patton* case, which this Court found insufficient to overcome the presumption in favor of the trial court's conclusion of impartiality. See *Patton*, 467 U.S. at 1039-40. In both instances, each juror answered the question of whether they could remain impartial despite their preconception by saying it would be "difficult." The perceptions of the parties and the trial court at Ward's trial were that Juror Stiles was fair and impartial based upon her extensive *voir dire* testimony.

Based on all of these factors, the Indiana Supreme Court failed to consider the totality of the circumstances of this case and the absence of any challenge for cause to determine whether the trial judge committed a manifest

error in empanelling this particular juror. The Indiana Supreme Court failed to follow this Court's well-established jurisprudence in disturbing the trial court's proper exercise of discretion in this regard.

Here, mindful of attending circumstances including pretrial publicity, the trial court properly discharged its role as the finder of fact and reasonably concluded that the jurors ultimately empanelled, including Juror Stiles, were accepted by Ward and had demonstrated that they were able to follow the law and render verdicts based on the evidence. This Court should grant the writ to review the constitutional issue of whether the Indiana Supreme Court applied the proper standards set forth in this Court's prior decisions to impute actual individual jury partiality based upon indicia of a general atmosphere of community prejudice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2005

APPENDIX A

In the
Indiana Supreme Court
No. 74S00-0108-DP-361

Roy Lee Ward,

Appellant (Defendant below),

v.

State of Indiana,

Appellee (Plaintiff below).

Appeal from the Spencer Circuit Court,
No. 74C01-0107-CF-158
The Honorable Wayne A. Roell, Judge

On Direct Appeal

June 30, 2004

Rucker, Justice.

Case Summary

As the result of a brutal slaying Roy Lee Ward was convicted of murder and sentenced to death. He was also convicted and sentenced to a term of years for rape and criminal deviate conduct. In this direct appeal Ward raises several issues for our review, one of which is that this case should not have been tried in the county where the crimes were committed because of community bias and pervasive pretrial publicity. The record supports this contention. We are therefore constrained to reverse and remand this cause for a new trial.

Facts and Procedural History

On the morning of July 11, 2001, fifteen-year-old Stacy Payne was present in her Dale, Indiana home. Also present was her younger sister Melissa who was asleep in

her bedroom. Stacy was waiting to leave for work. Other members of the family had already left for their jobs. Pretending that he was searching for a lost dog, Ward approached the Payne residence and convinced Stacy to allow him to enter the house. Thereafter Melissa awoke to the sound of Stacy screaming. Going to the top of the stairs Melissa saw a man lying on top of Stacy holding her down. Melissa then ran to her parents' room and dialed 911. As she was talking on the telephone Melissa could hear her sister saying "please stop."

Shortly thereafter the Dale Town Marshall arrived and saw Ward standing in the doorway, covered with perspiration, and holding a knife. Drawing his service revolver, the Marshall ordered Ward to the ground. Ward complied saying, "I didn't do anything." The Marshall then went to the kitchen and found Stacy lying on the floor, nude from the waist down, covered with blood, and her intestines exposed. Although conscious, Stacy could not speak. She was taken immediately to the emergency room of the Deaconess-St. Joseph Hospital where doctors noted a laceration to Stacy's abdomen, a laceration to her back that severed her spine, and a laceration across Stacy's neck cutting her trachea. Efforts to save Stacy's life were unsuccessful. A subsequent forensic examination revealed that Stacy suffered eighteen blunt force injuries, including injuries found within the vaginal vault.

On July 16, 2001, the State charged Ward with murder, and subsequently filed a notice of intent to seek the death penalty. Thereafter, the State filed an amended information to include one count of rape as a Class A felony and one count of criminal deviate conduct as a Class A felony.

The Town of Dale, located in southwestern Spencer County, is a small close-knit community. As of the 2000 census, Spencer County had a total population of 20,400. As one local newspaper recounted, "The brutal stabbing of a 15-year-old girl last week in her own home has left this

community, as well as surrounding communities, in shock and law enforcement officials in search of answers." Appellant's App. at 6281. Another newspaper reported, "Community reaction is one of stunned disbelief after the news of 15-year-old Stacy Payne's murder Wednesday afternoon in her own home outside of Dale. 'Things like this just don't happen in small towns like Dale, Indiana' is a common reaction to the news that has parents hugging their children, locking their doors and grieving with the Payne family." *Id.* at 6295.

On February 8, 2002, Ward filed a motion for change of venue from the county, or in the alternative a motion to draw the jury from another county pursuant to section 35-36-6-11 of the Indiana Code.[5] Although Ward later withdrew the motion when the trial court denied his request for a continuance for the purpose of having a survey conducted, Ward refiled the motion on April 11, 2002. As grounds for the motion Ward alleged public outrage, hostility, and prejudicial pretrial publicity. A hearing on the motion was conducted May 20, 2002. The parties stipulated into evidence several exhibits,

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[5] The statute provides,

> (a) In any criminal proceeding wherein the defendant is charged with murder or a Class A felony to be tried before a jury in which a motion for a change of venue from the county is filed, the court may recognize but decline to grant the motion, and order that the jury be drawn from the residents of a county other than the county in which the court is located.
>
> (b) Pursuant to an order under this section, the court may convene in any county in the state for purposes of jury selection. The venire may be drawn by the jury commissioners of a court in the jurors' home county, or may be drawn by the court itself by random selection.
>
> (c) After a jury is selected, the trial shall be held in the county of the court's location. The verdict of the jury and the judgment based upon it have the same validity and effect as if the jury had been drawn from the county of the court's location.

including twenty-five articles from four local and regional newspapers, and either the videotape or transcript from three local and regional television stations representing fifteen news stories. Although the news accounts were graphic and detailed, they were generally accurate. Many of the accounts however also included details of Ward's past criminal history that would not have been admissible at trial.[6] The evidence at the hearing, including testimony of witnesses, also revealed that a vigil was held for Stacy at which nearly twelve hundred people attended. Over five hundred mourners attended her

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[6] See David Kunz, "Motive missing in teen slaying," The Herald, July 13, 2001; Appellant's App. at 6269 ("Ward had recently been sentenced to jail in Harrison County Superior Court after pleading guilty to harassment and public indecency, both misdemeanors."); David Kunz, "Death penalty being sought for Ward," The Herald, Aug. 3, 2001; Appellant's App. at 6272 ("Ward was on probation until April 2004 in connection with a burglary conviction from Cooper County, Mo., records said."); W. Curt Vincent, "Teen stabbed to death," The Spencer County Journal-Democrat, July 19, 2001; Appellant's App. at 6282 (noting Ward's "long criminal record" which included at least eight prior convictions extending back to 1993); Bryan Walters, "Death penalty sought," The Journal-Democrat, Aug. 9, 2001; Appellant's App. at 6284 ("Ward was already on probation in Perry County for another crime."); Cheryl Hurst, "Investigation into murder of Dale girl continues," The Spencer County Leader, July 19, 2001; Appellant's App. at 6297 (noting Ward's convictions for burglary, harassment, public indecency, forgery, and theft); Bonnie Hackman, "Death penalty sought for murder of Stacy Payne," The Leader, Aug. 9, 2001; Appellant's App. at 6299 (noting the outstanding warrant for Ward for check deception and his status on probation for indecent exposure); Cheryl Hurst, "Trial date set for murder of Dale teen," The Leader, Nov. 15, 2001; Appellant's App. at 6301 ("Ward, a repeat offender, had been released from the judicial system time and again for charges relating to burglary, check deception, harassment, public indecency, forgery, theft and stalking."); Cheryl Hurst, "Investigation into murder of Dale girl continues," Ferdinand News, July 18, 2001; Appellant's App. at 6308 (noting Ward's convictions for burglary, harassment, public indecency, forgery, and theft); Bonnie Hackmann, "Death penalty sought for murder of Stacy Payne," Ferdinand News, Aug. 8, 2001; Appellant's App. at 6310 (noting the outstanding warrant for Ward for check deception and his status on probation for indecent exposure).

funeral. At the close of the hearing, the trial court took Ward's motion for change of venue under advisement. About a month before trial, at a hearing in which Ward appeared, an angry audience yelled at Ward as he was being escorted through the courthouse rotunda; the trial court admonished the crowd for its behavior.

On October 7, 2002, the jury selection process began. The trial court had summoned one hundred twenty-eight prospective jurors. Outside of their presence Ward renewed a number of previous motions and also requested the court to "grant our Motion for Change of Venue . . . ." Tr. at 4. The trial court responded, "All motions denied." *Id.* In groups of approximately thirty to forty, the prospective jurors were then brought into the courtroom where the trial court gave them a few brief instructions. The trial court also gave the prospective jurors a lengthy twenty-eight-page questionnaire that had been previously tendered by the defense and agreed to by the State. The prospective jurors were directed to complete the questionnaire, give it to the bailiff, and return to court the following day.

The parties began a two-day voir dire on October 8, 2002. The responses given on the questionnaires revealed the pervasive nature of the pretrial publicity, the extent of the community's knowledge about this case, and its understandable outrage. Of the one hundred twenty-eight prospective jurors summoned, one hundred twenty-two actually completed the questionnaire. Over eighty percent—101—reported that he or she had knowledge about the case. For example, one prospective juror wrote, "unless you live under a rock you have heard a lot" about this case. Appellant's App. at 3673. In response to the question, "what did you discuss and with whom?" another prospective juror said, "'with whom?' [E]veryone was talking about it – you couldn't go anywhere!" *Id.* at 5192.

In response to the question: "Based on what you have read, seen, or heard about this case, have you formed any beliefs as to the guilt or innocence of Roy Ward?" over

sixty-five percent—84 prospective jurors—checked "yes." When asked to "please describe your beliefs" the responses of the 84 prospective jurors ranged from "I think that he probably did it," *id.* at 2891, to "hang him instantly, and he should have been shot on the spot at the scene of the crime." *Id.* at 4456.[7]

During the course of voir dire a total of forty-eight prospective jurors were removed for cause either on challenge by the defense, the State, or *sua sponte* by the trial court. The State used sixteen peremptory challenges and Ward exhausted all of his.[8] Ultimately twelve jurors and two alternate jurors were selected and sworn. On the morning of the first day of trial, Ward renewed his motion for change of venue, which the trial court denied.

The record shows that of the jurors selected, all but one had heard, seen, or read about this case. And six of the seated jurors were among the over sixty-five percent who checked "yes" to the question of whether they had formed a belief concerning Ward's guilt or innocence. Juror #14 explained on his questionnaire "He was arrested at the home just a few minutes after the 911 call." *Id.* at 2914. Juror #84 wrote, "since he was at the

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[7] Other representative responses included, "Tie him up with rawhide in the desert and let him die slow and painful." Appellant's App. at 5169; "[T]hey should hang him up and start pulling off body parts." *Id.* at 3213; "[T]hey need to cut off his **** and stick it up his *** and gut him like he did her." *Id.* at 4709; "[T]he cop should have shot the S.O.B." Id. at 3005; "[S]hould be stoned to death. [J]ail would be to [sic] easy for him." *Id.* at 3904; "Death penalty for sure." *Id.* at 3006; "He is guilty. . . . He should not even deserve a trial." *Id.* at 3490; "[H]e should be given the same punishment that he gave to the victim." *Id.* at 3513; "[S]hould do to him what he done to her." *Id.* at 3535; "[Y]ou would have to prove to me Ward did not do the murder." *Id.* at 3863; "[S]hould be made to suffer, hang him, shoot him, electric chair, gas chamber." *Id.* at 4594; "How can he not be guilty[?]" *Id.* at 5123.

[8] One of Ward's claims on appeal is that the trial court abused its discretion by refusing to dismiss twelve prospective jurors for cause thereby forcing him to exhaust twelve of his twenty peremptory challenges. Because we resolve this case on other grounds, we decline to address this issue.

scene he might be the person who done [sic] it." *Id.* at 3611. When asked to describe her beliefs, Juror #121 replied, "It would be very difficult to form an unbiased opinion. He was caught at the site with a knief [*sic*] and the sister saw him. If it were my own daughters I would have probably come after him myself." *Id.* at 4019. When asked later in her questionnaire whether there was *anything* that might get in the way of her being an impartial juror, she checked "Yes" and wrote, "[H]e was caught at the site—I feel he's guilty." *Id.* at 4024.

Explaining the reasons for her beliefs, Juror #122 responded, "If everything that I have heard is true, it will be hard but not impossible to believe that he did not do it." *Id.* at 4042. The daughter of juror #122 attended the same school as the victim. *Id.* at 4025. She also commented on her questionnaire about the "devastation of [the] family" and the "horror of it all" and how the crime was "such a tragedy." *Id.* at 4042.

When asked on the questionnaire whether she had formed any beliefs about Ward's guilt or innocence, Juror #148 checked "Yes" and wrote, "This man was inside their house. Her sister saw him and called 911. I would listen with an opened [sic] mind, but I feel the evidence will be there and he will be convicted." *Id.* at 4433. She mentioned twice in her questionnaire the "pools of blood" that had surrounded the victim. *Id.* at 4432, 4433. When asked to describe what she had read, seen, or heard about this incident this juror responded, "He had entered the house, stabbed and raped her while her sister was upstairs making the 911 call. That he had been stalking her. The child was taken to Huntingburg Hospital and the Dr.'s faces were so grim and the workers had to keep wiping up the pools of blood from the injuries to this child." *Id.* at 4432.

Explaining her beliefs as to why she had reached an opinion in this case, Juror #152 wrote, "When the police enter[ed] the Payne home the man (Roy Ward) still had the knife in his hand." *Id.* at 4502.

Other than perfunctory questioning of whether they could be fair and impartial, to which each generally responded "yes", there was no voir dire examination conducted of these jurors to explore their previously expressed belief that Ward was guilty. There was more extensive questioning of Juror #121. But in the end she was not sure whether she could return a verdict based solely on the evidence presented at trial. The following exchange is instructive:

> [Prosecuting Attorney]: [Juror #121], do you believe that you can set aside what you've heard outside the courtroom or read outside the courtroom and any kind of preconceived ideas or notions that you may have and base your decision on the law and evidence that you hear in this courtroom?
>
> [Juror #121]: I could follow the Judge's direction on what to do and abide by the law, but I also have an opinion.
>
> [Prosecuting Attorney]: Okay. And I think that's – I would be surprised if people didn't have opinions. That's what we – as a society, we bring our opinions with us in everything we do. We all are creatures of habit, creatures of what we hear, and we have also our own set of individual personal beliefs that we bring to every issue. Do you believe that you could – let me ask it this way. Do you believe that your opinion would keep you from being fair to the Defendant or the State?
>
> [Juror #121]: It makes it very difficult, and I'm putting myself in that place.
>
> [Prosecuting Attorney]: Okay. I understand.

Tr. at 531-32

> [Trial Court]: Are you willing to lay aside anything you may have seen or heard about this case and hold the State of Indiana to a burden of proof to [prove] beyond a reasonable doubt of

> each and every element of each and every crime charged and base a decision solely on what you hear and see in this courtroom[?]
>
> . . .
>
> [Juror #121]: It's – I don't know; it's just hearsay from maybe what's in the paper, but I know that, other than just knowing what was on the paper – in the paper and on TV and having two daughters of my own and he was at the scene with the weapon I feel like would [sic] be very difficult for me to change my mind.

Id. at 585-86.

With the twelve jurors and two alternates thus selected, the guilt phase of trial was held over four days from October 14 through October 18, 2002. Ward did not take the stand in his defense. However during opening statements and closing arguments, counsel conceded that Ward "is responsible for Stacy Payne's death . . . ." *Id.* at 1103, 2627. The contested issues were whether he knowingly or intentionally killed her, raped her, and engaged in criminal deviate conduct. The jury convicted Ward as charged. The penalty phase of trial began October 21, 2002, and the jury returned a recommendation of death. Following a sentencing hearing, the trial court followed the jury's recommendation. The trial court also sentenced Ward to two consecutive fifty-year terms of imprisonment for the rape and criminal deviate conduct convictions. This direct appeal followed in due course.

Discussion

"At the heart of the decision on a motion for change of venue is the right to an impartial jury." *Lindsey v. State*, 485 N.E.2d 102, 106 (Ind. 1985). This right derives from the Sixth Amendment to the United States Constitution, as applied to the States by the Fourteenth Amendment, as well as Article One, Section Thirteen of the Indiana Constitution. "A fair trial in a fair tribunal is a basic

requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). A juror's verdict must be impartial "regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." *Morgan v. Illinois*, 504 U.S. 719, 727 (1992). In essence "the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (citations omitted).

Ward contends "Because of the Horrible Nature of the Crime, Pretrial Publicity, Prospective Jurors' Knowledge of the Crime and Victim and the Venire's Expressed, Overwhelming Predisposition to Convict, the Court Should Have Moved the Trial from Spencer County, Indiana." Br. of Appellant at 25.

We review a trial court's denial of a motion for change of venue for an abuse of discretion. *Specht v. State*, 734 N.E.2d 239, 241 (Ind. 2000). An abuse of discretion does not occur where voir dire reveals that the seated panel was able to set aside preconceived notions of guilt and render a verdict based solely on the evidence. *Elsten v. State*, 698 N.E.2d 292, 294 (Ind. 1998). The defendant must demonstrate the existence of two distinct elements: (1) prejudicial pretrial publicity and (2) the inability of jurors to render an impartial verdict. *Specht*, 734 N.E.2d at 241; *White v. State*, 687 N.E.2d 178, 179 (Ind. 1997). "Prejudicial pretrial publicity is that which contains inflammatory material which would not be admissible at the defendant's trial or contains misstatements or distortions of the evidence given at trial." *Burdine v. State*, 515 N.E.2d 1085, 1092 (Ind. 1987).

In this case the news reports were extensive, detailed and graphic. However they were largely accurate accounts of a horrific and brutal killing. On the other hand several of the news articles recounted Ward's criminal history. *See supra* n.2. In that regard the articles contained inflammatory, inadmissible information. Thus, Ward has established the existence of

prejudicial pretrial publicity. We acknowledge however that the prejudicial nature of the pretrial publicity is only marginally at issue here. Without regard to press accounts of Ward's criminal past, the critical inquiry is whether overall community bias and prejudice exist such that Ward was denied a fair trial. *See Lindsey*, 485 N.E.2d at 106. In other words even if Ward had no criminal history or if that history had not been reported, we nonetheless would be confronted with the question of whether jurors were able to render an impartial verdict. *White*, 687 N.E.2d at 179.

It is not a prerequisite to a fair trial that the jurors be totally ignorant of the facts involved. *Smith v. State*, 465 N.E.2d 1105, 1116 (Ind. 1984). Thus, a juror's mere exposure to press coverage is not enough to support a claim that local prejudice entitles a defendant to a change of venue. Even if potential jurors have been exposed to pretrial publicity concerning the defendant's case that alone is insufficient to establish prejudice unless the defendant can also demonstrate that the jurors were unable to set aside any preconceived notions of guilt and render a verdict based on the evidence. *Johnson v. State*, 472 N.E.2d 892, 906 (Ind. 1985); *see also* Ind. Code § 35-37-1-5(b) (providing that prospective juror may be allowed to serve despite existence of preconceived notions of guilt stemming from pretrial publicity, so long as the juror states and the court concludes that the juror can render a verdict based upon the law and the evidence presented). Essentially, in order to obtain a change of venue the defendant bears the burden of showing that community prejudice exists which would prevent the defendant from obtaining a fair trial in that community. *Clemens v State*, 610 N.E.2d 236, 240 (Ind. 1993).

In this case the pattern of deep and bitter hostility shown to be present throughout the community was clearly reflected in the juror questionnaires. In addition, six of the twelve jurors finally seated expressed the belief that Ward was guilty. We do not doubt the sincerity of

the jurors who said they could set aside their preconceived beliefs and render a verdict based on the evidence. Indeed there is a presumption that the juror's voir dire is truthful. *Brown v. State*, 563 N.E.2d 103, 105 (Ind. 1990). However, this presumption can be overcome by a showing of a general atmosphere of prejudice throughout the community. *Id.* As expressed by the United States Supreme Court:

> In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by it.

Murphy v. Florida, 421 U.S. 794, 803 (1975). The record establishes that the presumption has been overcome in this case. Even more disturbing, however, one juror candidly and honestly admitted "I don't know" when asked by the trial court whether she was willing to base a decision solely on the evidence presented at trial. Tr. at 584. Having previously expressed the belief that Ward was guilty this juror said she felt that "it would be very difficult for me to change my mind." *Id.* This juror's view alone requires that we grant Ward a new trial. "If even one [partial] juror is empaneled [*sic*] and the death sentence is imposed, the State is disentitled to execute the sentence." *State v. Dye*, 784 N.E.2d 469, 476 (Ind. 2003) (quoting *Morgan*, 504 U.S. at 729). With his life at stake, we think the Constitution requires that the defendant "be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which [one half] of the members admit, before hearing any testimony, to possessing a belief in his guilt." *Irvin*, 366 U.S. at 728. We conclude therefore that the trial court abused its discretion in failing to grant Ward's motion for change of venue from the county, or in the alternative to draw the jury from another county. Accordingly, we reverse the

trial court on this issue and remand this cause for a new trial.

Judgment reversed and cause remanded.

Shepard, C.J., and Dickson, Sullivan and Boehm, JJ., concur.

CLERK
SUPREME COURT, COURT OF APPEALS,
AND TAX COURT
STATE OF INDIANA
217 STATE HOUSE, INDIANAPOLIS, IN 46204
317-232-1930 • FAX 317-232-8365

David C. Lewis
Clerk

Cause Number
74S00-0108-DP-00361
Lower Court Number:
74C010107CF158

WARD, ROY LEE -V- STATE OF INDIANA

You are hereby notified that the SUPREME COURT has on this day 9/21/04

APPELLEE'S PETITION FOR REHEARING DENIED WITHOUT OPINION.

RANDALL T. SHEPARD, CHIEF JUSTICE
ALL JUSTICES CONCUR. MS

WITNESS my name and the seal of said Court,
This 21ST day of SEPTEMBER, 2004

s/David C. Lewis
Clerk, Supreme Court, Court of Appeals and Tax Court

State of Indiana)	In the Spencer Circuit Court
) SS:	Criminal Division
County of Spencer)	2002 Term
	Cause No. 74C01-0107-CF-158
STATE OF INDIANA)	
)	
vs.)	
)	
ROY LEE WARD)	

ORDER

This cause is before the Court on the defendant's Motion for Change of venue.

This Court recognizes that this case has generated publicity. The Court also recognizes that each pre-trial hearing will continue to generate publicity. However, after a review of the media coverage of this case, the Court concludes that, thus far, the media have engaged in responsible journalism.

The defendant has not been able to demonstrate any widespread bias which would prevent the impaneling of an impartial jury of Spencer County citizens. The key question during voir dire of potential jurors will be whether they will be able to lay aside anything they may have heard about this case and reach a fair and impartial verdict based solely upon the evidence presented during the trial and the Court's instructions as to the law. The Court believes that there will be a sufficient number of Spencer County citizens who are able to answer this question in the affirmative. Should this not be the case, this order can be revisited.

The defendant's Motion for Change of Venue is denied.

So ordered this 31st day of May, 2002.

s/Wayne A. Roell
Wayne A. Roell
Judge, Spencer Circuit Court